



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000105
First-tier Tribunal Nos:
EA/02773/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

UPPER TRIBUNAL JUDGE LANE
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR ABU BAKAR AHSAN
[ANONYMITY DIRECTION NOT MADE]

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: No appearance

Heard at Field House on Monday 2nd July 2024

DECISION AND REASONS

1. It is the Secretary of State who is appealing in these proceedings. However, for convenience we will continue hereinafter to refer to the parties as in the First-tier tribunal.

The first application

2. The appellant is a national of Pakistan. On the 8th of July 2022 he applied under the EU settlement scheme for entry clearance to join his wife, Mrs Asya Ventsislova Ilieva. She is a national of Bulgaria granted pre-settled status. We will refer to her hereinafter as his sponsor. This application was refused on the 13th of November 2022.

3. Their marriage certificate, dated 16 July 2019, was provided, and showed they married in Cyprus where they were living.
4. The sponsor in her statement said she came to the United Kingdom in October 2020, with the appellant joining her in March 2022.
5. There was a death certificate indicating the sponsor gave birth to a daughter on 24 August 2021 in the United Kingdom and that she died on the 8 December 2021. There was reference to a second child, born on 7 June 2023, in the United Kingdom.
6. The refusal refers to their failure to attend two interviews in relation to it. An invitation was sent on the 4th of October 2022 for a video interview on the 14th of October 2022, but the appellant and his wife did not attend. On the 14th of October 2022 a further invitation for a video link interview on the 4th of November 2022 was sent. The appellant and his wife cancelled without giving a reason. The respondent referred to their failure to attend and of insufficient evidence about the marriage and concluded it was one of convenience.
7. The appellant appealed the decision of the 13th of November 2022. The respondent had carried out a pre appeal review and sent an e-mail to the tribunal office on the 13th of December 2022. It indicated that the decision was being withdrawn with a view to reconsideration and the hearing date could be vacated. The appellant was advised of this on the 20th of December 2022. He indicated he was having mental health issues and could not attend a rearranged interview and asked that the matter proceed before a judge.
8. The appeal did proceed, indicating the decision was not ultimately withdrawn. It was heard by First tier Tribunal Judge McLaren at Glasgow on the 4th of January 2023 on the papers.
9. First tier Tribunal Judge McLaren referred to a GP letter dated the 16th of December 2022. She commented it was not clear if the doctor had seen the appellant in person and attached very little weight to the letter and found it did not show he was unfit to attend for interview.
10. The judge went on to find there was a mix up in the arrangements about the appellant on his wife attending for interview and referred to the respondent's suggestion of the decision being withdrawn. The judge then referred to the sponsor statement and evidence of cohabitation but found the evidence did not advance the claim to any great extent. The judge commented that there were parts of the statement which called for explanation. The judge concluded that more likely than not the marriage was one of convenience and dismissed the appeal.

The second application

11. The appellant then made a further application on the 27th of February 2023. The appellant and his wife were again sent letters of invitation for interview on the 3rd of July 2023 on 7th of July 2023. The latter was scheduled for the 21st July 2023. Again, they did not attend. This second application was refused on the 17th of July 2023. The refusal was based on similar considerations to the first.
12. The appellant appealed again, and this was heard on the papers before First tier Tribunal Judge Peer. The judge makes no reference to the earlier appeal.
13. The judge refers to Directions issued but not complied with. It appears that not all of the paperwork had been provided and some of the information in the paperwork was inaccurate. The respondent's bundle contained the wrong refusal decision. The judge refers to the application form as being the 8th of July 2022, with the refusal being the 13th of November 2022. This would be a reference to the first application set out above.
14. The judge commented that if the appellant and his wife had lived together in Cyprus before and after their marriage it was not clear how their marriage was entered into as a means to circumvent any rights to enter or reside in the United Kingdom. Reference was made to the appellant's two children.
15. The judge refers to the appellant's failure to attend to interviews in July 2023 and points out the respondent cannot rely on a failure to attend an interview apparently scheduled to take place after the date of decision. The judge went on to say that the appellant had provided an explanation for the failure to attend the second interview, pointing out they were only given a few days' notice and had the recent death of their child. The judge concluded that the respondent had not met the legal burden of proof and therefore allowed the appeal.

The Upper Tribunal

16. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Buchanan on the 28th of December 2023. It was arguable the judge erred in law by not applying the Devaseelan principle in relation to the first appeal before FTTJ McLaren.
17. There is a skeleton argument from the respondent dated the 7th of March 2024. It refers to the failure to attend for two interviews and FT Judge Peer not following the Devaseelan principle.

Consideration

18. The appellant has not attended nor was he represented. We have received a letter from a GP dated the 28th of June 2024 indicating he suffered a stroke in March 2024 and as a result has left sided weakness

and his mobility is restricted and he needed to use a wheelchair. Mr Tufan advised us that there had been a previous adjournment when he did not attend. He said the main point in the appeal related to the Devaseelan principles. He queried if the first decision was in fact been put before FT Judge Peer.

19. The papers on file show that the appeal had previously been listed on the 12th of March 2024. There was a letter on file from his wife indicating he was unable to attend because of his health and she could not attend because of childminding commitments. The letter refers to the documentation provided on the explanation given for not attending the interviews.
20. We decided to proceed. We concluded the judge materially erred in law in not applying the Devaseelan principle. The issues and the evidence were essentially the same. The application of Devaseelan helps make for consistency in decision making. There is no reference whatsoever to the earlier determination. This was a hearing on the papers, and, like Mr Tufan, we suspect it may not have been placed before the judge and note the judge's reference to the wrong decision in the papers. We noted examples indicating the bundle provided to the First-tier judge were incomplete. We cannot speculate as to what happened, but it was not referred to and it should have been. In the circumstance we find it amounts to a material error of law.

Decision

The decision of First tier Tribunal Judge Peer is set aside. The appeal is to be listed for a *de novo* hearing in the First-tier tribunal on the papers.

Directions

- i. The appeal is to be listed on the papers, not before First tier Tribunal Judge Peer.**
- ii If the appellant wishes to have an oral face to face hearing or to avail of the CVP facilities then he should advise the First-tier Tribunal within 21 days. If so, he should also advise if an interpreter would be required for himself and his wife.**
- iii. The appellant and his wife should provide a written statement and any further evidence upon which they rely no later than 21 days before the listed hearing.**
- iv. The respondent should provide any further material upon which they rely in the same time frame.**
- v. An oral hearing can we expect it to last half a day.**

FJFarrelly

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

13th August 2024